IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7335 OF 2005

Gopal Sondur ..Petitioner.
vs.
Rajini Sondur and anr. ..Respondents.

Mr. Sayyed Akhtar with Mr. A.T. Agarwal
for the petitioner.
Mr. A.H. Palekar, AGP for state.
Mr.Sangeer A. Khan for respondent no.1.

CORAM: S.U. KAMDAR, J.

DATE : 5TH DECEMBER, 2005.

JUDGMENT :

1. The present petition is challenging the order dated 23.9.2005 passed by the family court in interim Application no. 128 of 2004 for the custody of the female child. Some of the material facts of the present case are as under :

2. The petitioner and the respondent are married according to the Hindu Vedic rights on 21.6.19876.

Thereafter the petitioner lived in Sweden. Subsequent to 19.9.1993 a daughter was born to the petitioner and respondent known as Natasha. The said daughter was suffering from Down's syndrome and autistic spectrum disorder. Sometime in or about 1996-97 the petitioner was posted in India by the employer and subsequently the petitioner shifted from India to Sydney in Australia. On 9.2.2001 a son was born to the petitioner and the respondent couple at Sydney in Australia. In October 2002 the petitioner changed his employment and has joined the company known as Infosys Technologies Limited in Australia taking care of the Asia Pacific region business operations. On 17.12.2003 the respondent and the children left Sydney for India and subsequently the petitioner arrived in India on 25.12.2003. It it the case of the petitioner that contrary to the understanding the respondent herein refused to go back to Australia and retained the custody of the children with her. On 3.2.2004 the petitioner came to India to meet the respondent and the members of her family and it seems that inspite of repeated

efforts there was no reconciliation between the petitioner and the respondent. Sometime on or about 13.12.2004 the petitioner took custody of the girl child Natasha and went to attend the wedding of his sister in Bangalore and since then the custody of the child is with the petitioner. The relationship between the petitioner and the respondent further deteriorated and on 5.4.2004 the respondent filed a petition for the custody being Petition A 531/2004 and thereafter took out an application for interim custody being 128 of 2004. On 4.5.2004 the petitioner filed a writ petition in the High Court of Karnataka inter-alia seeking an order restraining the government and the Foreign Affairs Ministry from extending the visa of the minor children and or making any change in status of their visa. He also claimed that he should be permitted to take custody of both the children to Sydney. On 1.1.2005 the petitioner also filed an application before the Family court inter-alia contending that the Family court has no jurisdiction since both the petitioner and the respondent are the domicile of Australia and not of

India and thus that Family court has no jurisdiction to try the said proceedings. On 7.2.2005 the Karnataka High Court dismissed the said petition. It is the case of the petitioner that the writ appeal is pending before the Division bench of that court. On 11.4.2005 the division bench of this court has held that the family court has jurisdiction and the family court can proceed with the matter and determine the matter in accordance with law. It seems that the petitioner has further preferred an appeal against the said order and judgment to the Hon'ble Supreme Court of India and the proceedings are pending against the said order before the Supreme Court.

3. On 16.8.2005 the petitioner filed a reply to the application of the respondent for interim custody of the daughter Natasha on merits since this court held that the family court does have jurisdiction. A rejoinder has been filed and ultimately after hearing the parties the family court has passed an order directing interim custody of both the children to the respondent and to hand

over the custody of the daughter Natasha to the respondent herein. Under the impugned order the family court has given the custody to the respondent and has granted the petitioner access to the said children including the son on prior intimation and also has directed to share the vacations with the children. It is this order of the petitioner which is a subject matter of challenge before me.

4. Learned counsel appearing for the petitioner has placed before me three submissions on the basis of which he has challenged the order passed by the family court. It has been contended that the petitioner is having the custody of the female child Natasha from last 20 months and there is no change of circumstances which calls for sudden order of handing over the custody of the child from the petitioner to the respondent herein. It has been further contended by the learned counsel for the petitioner that the change in the custody at this juncture is not in the interest of the child particularly when the child is suffering from Down

Syndrome. The third contention advanced by the learned counsel for the petitioner is that the petitioner is better equipped to look after the child than the respondent mother because the petitioner has done great research and acquired knowledge of a special nature to look after the child who is suffering from the said disease Down's Syndrome. It has been further contended that it is not in the interest of the child to hand over the custody to the respondent mother particularly after having had the custody of the child for 20 months. The third and the last contention advanced by the learned counsel for the petitioner is that the petitioner is staying at home and earning from his consultancy work and thus always available to look after the daughter and therefore it is not in the interest of the child that the custody to be handed over to the petitioner who is an architect by profession and is not likely to be available to the daughter who needs special constant attention due to Down's Syndrome. On the other hand the learned counsel for the respondent has contended that the submissions made by the petitioners are without any

merits. Firstly it has been contended that the petitioner forcible took away custody of the child under the guise of taking the child to marriage sometime in or about February, 2004 and the petitioner immediately on 5.4.2004 has filed an application for custody of the child. It is the time which has been consumed during the course of the proceedings by raising frivolous objections such as to the jurisdiction of the family court and therefore the petitioner has been able to retain the custody of the female child. In the circumstances it is not open for the petitioner to claim that, because the proceedings of taking custody of the child has taken time and during that time the custody was with the petitioner and therefore no order should be passed of handing over the custody. Learned counsel for the respondent has further contended that looking at the physical and mental status of the child which is of paramount importance that the custody of the girl child to be handed over to the mother who is best equipped to look after the need of the girl child as she would be able to understand the need and

requirement of the girl much better than the petitioner herein. Learned counsel has thereafter contended that the so call claim made of research by the petitioner is bogus. Merely by producing internet downloads of the disease called Down's syndrome nothing else has been produced to show that the petitioner has done any research and /or acquired any special knowledge to deal with the cases of Down's Syndrome. Learned counsel for the respondent has further contended that the child is suffering from Down's Syndrome and is not capable of looking after her day to day health requirement particularly because she is attaining the age of puberty and thus it is necessary that only her mother should be permitted to have the custody of the girl child at such a tender age. It is further contended that when the girl child reaches the age of puberty she passes through many physical as well as mental changes which require special care and attention by the mother and thus the family court was right and justified in handing over the custody of the child to the mother in preference to the petitioner who is the father. Learned counsel for

the respondent has vehemently contended that the interest of the child being of paramount importance the aforesaid factors are relevant for the purpose of determining to whom the said custody is to be handed over.

5. After considering the rival contentions of the parties I do not find any error apparent on the face of the record in the order passed by the Trial court in Interim Application No. 128 of 2004. The trial court has in its order considered the various aspects particularly the aspect that the child being a girl child and is suffering from Down's Syndrome it is necessary that the child be looked after by the mother. The learned Trial court has also considered the fact that the child is attaining the age of puberty and further the child is suffering and incapable of looking after herself, it is necessary that the mother's care is more important for the child. Neither are there any serious allegations before the family court nor before me about the capacity or about the character of the mother which could disentitle her from

taking the custody of the daughter child. The argument of the learned counsel for the petitioner that there is no change of circumstances from last 20 months when the child was in the custody of the petitioner and thus the petitioner be permitted to retain the custody and should not be directed to hand over the child to the respondent herein is totally erroneous and baseless. The proceedings have been initiated within a period of two months from the date on which the petitioner took away the child surreptitiously from the custody of the mother and thereafter the respondent is contesting the said proceedings. Not only that, the petitioner to retain the custody of the child has also filed various proceedings and delayed the final hearing of the application of the custody by the family court. In that light of the matter to accept the argument of the petitioner that because the custody of the child was with him for last 20 months he should be permitted to retain the custody and should not be directed to hand over the custody of the child to the mother is without any merits. In my opinion the petitioner has acquired no such

extra-ordinary knowledge pertaining to Down's Syndrome nor has any material been produced before me. Learned counsel has undoubtedly drawn my attention to the various annexures to the bulky petition in which large number of internet downloads have been produced. Mere production of internet download does not in my opinion presuppose any such acquisition of any special knowledge to look after the said child. In my opinion looking at the facts and circumstances of the case that the custody sought of the child is a girl and suffering from Down's Syndrome and further that she is of the age of puberty it is necessary that the custody be handed over to the mother for specific and special care. The court below has considered the aforesaid aspect and has given its finding. The finding cannot be treated as perverse or based on no material or irrational or that there is error apparent on the face of the record which can call for any interference under Article 227. Furthermore the conduct of the petitioner in seeking to revoke the visa of the children so that the respondent loses the custody of the same and he

can take them away to Australia is also such which indicates the mindset of the petitioner. The conduct of the petitioner in filing the proceedings challenging the jurisdiction of the family court resulting in delay in determining the custody application are relevant considerations so as to determine whether the contention of the petitioner that he is the best father who can look after the child in the best manner should be accepted by this court or not. In my opinion the petitioner is not entitled to the custody of the child and the court has rightly given the custody of the girl child to the respondent herein who is the natural mother. In the aforesaid circumstances I do not find any reason to interfere with the order passed by the trial court which is essentially an inter-locutory order. In my opinion the respondent is not at all prejudiced by the impugned order because the court has rightly balanced the order by granting access to the petitioner including sharing of the vacations. In the aforesaid circumstances the petition is liable to be rejected. The petition is accordingly dismissed. However there shall be no

order as to costs.

6. Ad interim order dt.28.10.05 to continue for a period of two weeks. Certified copy expedited.

****